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U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship and Immigration Services

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FILE: [redacted] Office: LOS ANGELES, CA Date: JUL 14 2009

IN RE: [redacted]

PETITION: Application for Waiver of Grounds of Inadmissibility under Section 212(h) of the Immigration and Nationality Act, 8 U.S.C. § 1182(h)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Los Angeles, California and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Mexico who was found to be inadmissible to the United States under section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of a crime involving moral turpitude.[1] The applicant is the spouse of a U.S. citizen of the United States and the father of three United States citizen children and seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), so that he may reside in the United States with his spouse and children.

The Field Office Director concluded that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Application for Waiver of Grounds of Excludability (Form I-601) accordingly. *Decision of the Field Office Director,* dated November 15, 2008.

On appeal, counsel contends that United States Citizenship and Immigration Services (USCIS) erred in finding the applicant inadmissible for a crime involving moral turpitude. *Form I-290B; Attorney's statement*, dated April 19, 2005. The record also includes evidence to support a claim that the applicant's family would suffer extreme hardship.

In support of her claims, counsel submits a statement. The record also includes, but is not limited to, medical letters for the applicant's mother; statements from the applicant; an employment letter for the applicant; earnings statements for the applicant's spouse; a tax statement for the applicant and his spouse; Form W-2s for the applicant's spouse; medical records for the applicant; a statement from the applicant's spouse; a medical letter for the applicant's spouse; certificates and school report cards for the applicant's children; a statement from the applicant's mother-in-law; a statement from the teacher of one of the applicant's children; criminal court documents and records for the applicant; a police clearance letter for the applicant; and bank statements for the applicant and his spouse. The entire record was considered in rendering a decision on the appeal.

Section 212(a)(2)(A) of the Act states in pertinent part:

> (i) [A]ny alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of-

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[1] The AAO notes that the record also reflects that the applicant was unlawfully present in the United States from April 1, 1997, the effective date of the unlawful presence provisions of the Act, until his departure in September or October 1998 under a grant of advance parole. The applicant was paroled back into the United States on October 4, 1998 for an indefinite period and there is no evidence that he has departed the United States since his return. *Form I-512, Authorization for Parole of an Alien into the United States.* Although the applicant accrued unlawful presence for over one year, it has been more than ten years since his September or October 1998 departure. As such, the applicant is no longer inadmissible under section 212(a)(9)(B)(i)(II) of the Act.

> (I) a crime involving moral turpitude . . . or an attempt or conspiracy to commit such a crime . . . is inadmissible.

Section 212(h) of the Act provides, in pertinent part:

> (h) The Attorney General [Secretary of Homeland Security] may, in his discretion, waive the application of subparagraph (A)(i)(I) . . . of subsection (a)(2) . . . if -
>
> (1) (A) in the case of any immigrant it is established to the satisfaction of the Attorney General [Secretary] that –
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> (i) . . . the activities for which the alien is inadmissible occurred more than 15 years before the date of the alien's application for a visa, admission, or adjustment of status,
> (ii) the admission to the United States of such alien would not be contrary to the national welfare, safety, or security of the United States, and
> (iii) the alien has been rehabilitated; or
>
> (B) in the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General [Secretary] that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien . . .

In *Matter of Perez-Contreras*, 20 I&N Dec. 615, 617-18 (BIA 1992), the Board of Immigration Appeals (Board) held that:

> [M]oral turpitude is a nebulous concept, which refers generally to conduct that shocks the public conscience as being inherently base, vile, or depraved, contrary to the rules of morality and the duties owed between man and man, either one's fellow man or society in general.
>
> In determining whether a crime involves moral turpitude, we consider whether the act is accompanied by a vicious motive or corrupt mind. Where knowing or intentional conduct is an element of an offense, we have found moral turpitude to be present. However, where the required mens rea may not be determined from the statute, moral turpitude does not inhere.

(Citations omitted.) Neither the seriousness of the criminal offense nor the severity of the sentence imposed is determinative of whether a crime involves moral turpitude. *Matter of Serna*, 20 I&N Dec. 579, 581 (BIA 1992). Before one can be convicted of a crime of moral turpitude, the statute in question, by its terms, must necessarily involve moral turpitude. *Matter of Esfandiary*, 16 I&N Dec. 659 (BIA 1979); *Matter of L-V-C*, 22 I&N Dec. 594, 603 (BIA 1999).

The record reflects that, on February 17, 1994, the applicant pled nolo contendere to the offenses of sexual battery under California Penal Code 243.4(d)(1), Indecent Exposure under California Penal Code 314(1) and Annoy/Molest Children under California Penal Code 647.6. *Disposition of Arrest and Court Action*, certified copy dated December 22, 1997; *Court records, County of Santa Cruz, State of California*, dated February 17, 1994; *Case Print, Superior Court of California, County of Santa Cruz*, certified copy dated October 28, 2003. The applicant was sentenced to serve 90 days in jail and was placed on probation for 36 months. *Id.* On February 24, 1999 the applicant pled guilty to Driving Under Influence of Alcohol or Drugs under California Vehicle Code 23152(B). *Court records, Municipal Court of Whittier Judicial District, County of Los Angeles, State of California*, certified copy dated September 15, 2003. He was ordered to pay a fine or serve 13 days in jail and was placed on probation for 36 months. *Id.*

The applicant was convicted under section 243.4(d)(1) of the 1994 California Penal Code, which stated:

> Any person who touches an intimate part of another person, if the touching is against the will of the person touched, and is for the specific purpose of sexual arousal, sexual gratification, or sexual abuse, is guilty of misdemeanor sexual battery . . . .

Counsel asserts that the applicant's conviction for sexual battery is not a crime involving moral turpitude. *Attorney's statement*, dated April 19, 2005. In support of her assertion, she cites *Toutoujian v. INS*, 959 F.Supp 598 (W.D.N.Y. 1997), noting that a conviction under Canada Criminal Code section 173(1)(a) for grabbing a woman on her buttocks was not found to necessarily involve moral turpitude. *Id.* However, the case counsel cites is from a district court in New York and is not controlling in the applicant's jurisdiction of California. Moreover, section 173(1)(a) of the Canada Criminal Code does not involve sexual battery, as defined in section 243.4(d)(1) of the 1994 California Penal Code. The AAO also notes that the court in *People v. Chavez,* 84 Cal. App. 4th 24 (2000) found that a misdemeanor conviction under section 243.4(d) is a crime involving moral turpitude, concluding that sexual battery is a specific intent crime consisting of touching an intimate part of another's body against the will of that person for the purposes of sexual arousal, sexual gratification or abuse and deserving of moral condemnation. As such, the AAO finds that the applicant's conviction for sexual battery under section 243.4(d)(1) of the 1994 California Penal Code to be a crime involving moral turpitude.

In the recently decided *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008), the Attorney General articulated a new methodology for determining whether a conviction is a crime involving moral turpitude where the language of the criminal statute in question encompasses conduct involving moral turpitude and conduct that does not. First, in evaluating whether an offense is one that categorically involves moral turpitude, an adjudicator reviews the criminal statute at issue to determine if there is a "realistic probability, not a theoretical possibility," that the statute would be

applied to reach conduct that does not involve moral turpitude. *Id.* at 698 (citing *Gonzalez v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)). A realistic probability exists where, at the time of the proceeding, an "actual (as opposed to hypothetical) case exists in which the relevant criminal statute was applied to conduct that did not involve moral turpitude. If the statute has not been so applied in any case (including the alien's own case), the adjudicator can reasonably conclude that all convictions under the statute may categorically be treated as ones involving moral turpitude." *Id.* at 697, 708 (citing *Duenas-Alvarez*, 549 U.S. at 193).

However, if a case exists in which the criminal statute in question was applied to conduct that does not involve moral turpitude, "the adjudicator cannot categorically treat all convictions under that statute as convictions for crimes that involve moral turpitude." 24 I&N Dec. at 697 (citing *Duenas-Alvarez,* 549 U.S. at 185-88, 193). An adjudicator then engages in a second-stage inquiry in which the adjudicator reviews the "record of conviction" to determine if the conviction was based on conduct involving moral turpitude. *Id.* at 698-699, 703-704, 708. The record of conviction consists of documents such as the indictment, the judgment of conviction, jury instructions, a signed guilty plea, and the plea transcript. *Id.* at 698,704, 708.

If the review of the record of conviction is inconclusive, an adjudicator then considers any additional evidence deemed necessary or appropriate to resolve the moral turpitude question. 24 I&N Dec. at 699-704, 708-709. The sole purpose of this inquiry is to ascertain the nature of the prior conviction. Finally, in all such inquiries, the burden is on the applicant to establish "clearly and beyond doubt" that he or she is not inadmissible. *Id.* at 709 (citing *Kirong v. Mukasey*, 529 F.3d 800 (8th Cir. 2008).

The record reflects that the applicant was convicted under section 647.6 of the 1994 California Penal Code for annoying or molesting a child less than 18 years of age. Under California law, a conviction for having annoyed or molested a child requires motivation of unnatural or abnormal sexual interest in children. *In re Gladys R.,* 1 Cal.3d 855, 867, 83 Cal.Rptr. 671, 464 P.2d 127 (1970) (confirming interpretation of *People v. Pallares*, 112 Cal.App.2d Supp. 895, 901, 246 P.2d 173 (1952)). Sexual offenses committed against children have long been held to be crimes involving moral turpitude. *Matter of Garcia*, 11 I&N Dec. 521 (BIA 1966); *Matter of C—*, 5 I&N Dec. 65 (BIA 1953). However, the AAO also notes that a broad range of conduct has been found to constitute annoying or molesting a child under section 647.6 of the California Penal Code. In *People v. Thompson,* 206 Cal.App.3d 459, 465; 253 Cal.Rptr. 564 (1988), the court found that a misdemeanor conviction for annoying or molesting a child did not require the specific act of annoying to be lewd or obscene, only that there be proof of acts by which a normal person would be "unhesitatingly irritated," provided those acts were motivated by an abnormal or unnatural sexual interest in the child victim. It further concluded that hand and facial gestures that were calculated to disturb or irritate, although not lewd, were sufficient for a conviction under the statute. *Id.* at 467. In *People v. LaFontaine*, 79 Cal.App.3d 176, 185; 144 Cal.Rptr. 729 (1978), words alone were determined to constitute annoyance or molestation of a child under 18 years of age. Thus, it appears that section 647.6 of the 1994 California Penal Code may have encompassed (hypothetically) conduct that involved crimes involving moral turpitude and conduct that did not.

In accordance with *Silva-Trevino*, the AAO must determine if an actual case exists in which this statute was applied to conduct that did not involve moral turpitude. The AAO is not aware of any prior case in which a conviction has been obtained under section 647.6 of the California Penal Code for conduct that was found not to involve moral turpitude. Therefore, in accordance with the language of *Silva-Trevino*, the AAO will review the record as part of its categorical inquiry to determine if the statute was applied to conduct that was found not to involve moral turpitude in the applicant's own criminal case.

The limited number of documents comprising the record of conviction in the applicant's file fail to offer any indication of what the applicant actually did. Instead, they repeat the statutory language of section 647.6, i.e., that the applicant was charged with and convicted of annoying or molesting a child less than 18 years of age. The record contains no additional materials, e.g., an arrest report, which describe the actions or circumstances that resulted in the applicant's conviction. Therefore, the AAO is unable to determine the nature of the crime committed by the applicant. Accordingly, it finds that the applicant has failed to establish that his conviction under section 647.6 of the 1994 California Penal Code was for a crime that did not involve moral turpitude and must conclude that he has been convicted of two crimes involving moral turpitude.[2]

The AAO now turns to the applicant's eligibility for a waiver under section 212(h) of the Act.

An application for admission or adjustment is a "continuing" application, adjudicated based on the law and facts in effect on the date of the decision. *Matter of Alarcon*, 20 I&N Dec. 557 (BIA 1992). Therefore, section 212(h)(1)(A) of the Act applies to the applicant as the crimes for which he has been found inadmissible to the United States occurred more than 15 years prior to his application for adjustment of status. As a result, he may establish statutory eligibility for a waiver by showing that he is not a risk to the welfare, safety or security of the United States and that he has been rehabilitated. The applicant in this matter has not been convicted of any criminal activity in ten years. *FBI sheet*, dated October 17, 2006.

There is no indication in the record that the applicant has ever relied on the government for financial assistance or will rely on the government for financial assistance. Rather, it indicates that he and his spouse have paid federal taxes. *Tax statement.* Further, there is nothing in the record that points to the applicant's involvement in any activities that would undermine national safety or security. The applicant has not been convicted of any crime since his Driving Under the Influence conviction in 1999. *FBI sheet*, dated October 17, 2006. The applicant has also had a history of regular employment, as evidenced by a statement from his employer. *Statement from the applicant's employer,* dated November 11, 1994. Therefore, the AAO finds the record to demonstrate that admitting the applicant to the United States would not be contrary to its national welfare, safety, or security, and that he is rehabilitated.

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[2] Counsel asserts that the applicant's conviction for indecent exposure under section 314(1) of the California Penal Code is not a conviction for a crime involving moral turpitude. As the applicant has been determined to be inadmissible under section 212(a)(2)(A)(i)(I) of the Act for his convictions under sections 243.4(d)(1) and 647.6 of the 1994 California Penal Code, the AAO will not address the applicant's conviction for indecent exposure.

The granting of the waiver is discretionary in nature. The favorable discretionary factors for the applicant in this case include the applicant's U.S. citizen spouse and three U.S. citizen children, and the general hardship they would suffer in his absence. *United States birth certificates*. The record also includes two statements of support attesting to the positive role the applicant has played in the lives of his family members. *Statement from the applicant's spouse,* dated April 16, 2005*; Statement from the applicant's mother-in-law,* dated April 14, 2005. As previously noted, the applicant has also paid taxes. *See tax statement.* The AAO, however, is unable to find that these favorable factors outweigh the unfavorable factors of the applicant's prior criminal convictions for sexual battery and annoying or molesting a child less than 18 years of age as it lacks any information regarding the facts underlying the applicant's conviction, including the age of the victims and the applicant's specific acts. Therefore, the applicant may not be approved for a 212(h) waiver of his inadmissibility pursuant to 212(a)(2)(A)(i)(I) of the Act.

In proceedings for an application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of establishing that the application merits approval rests with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. In this case, the applicant has not met his burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.